

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB Nos. 19-0537 and 19-0537A

XAVIER HERNANDEZ)	
)	
Claimant-Respondent)	
Cross-Petitioner)	
)	
v.)	
)	DATE ISSUED: 05/22/2020
NATIONAL STEEL AND SHIPBUILDING)	
COMPANY)	
)	
Self-Insured)	
Employer-Petitioner)	
Cross-Respondent)	DECISION and ORDER

Appeals of the Attorney Fee Order of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), San Rafael, California, and Jeffrey M. Winter, San Diego, California, for claimant.

Roy D. Axelrod (Law Office of Roy Axelrod), San Diego, California, for self-insured employer.

Before: BUZZARD, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Attorney Fee Order (2016-LHC-00465; 2016-LHC-00466) of Administrative Law Judge Christopher Larsen rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion or not in accordance with law. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

The administrative law judge awarded claimant temporary total disability benefits from October 22, 2012 through June 9, 2013, and scheduled permanent partial disability benefits for a 25 percent work-related left knee injury.¹ Claimant's counsel filed a petition for an attorney's fee for work performed before the Office of Administrative Law Judges. Employer filed objections to the fee petition to which claimant's counsel replied. Claimant's counsel additionally filed an amended fee petition. Ultimately, he requested a fee totaling \$74,372.45, representing 85.8 hours of attorney time at an hourly rate of \$515 (Winter), 47.8 hours of attorney time at an hourly rate of \$385 (Ellis), 3.2 hours of attorney time at an hourly rate of \$385 (MacInnes), 24.4 hours of paralegal time at an hourly rate of \$130 (Lacina), and \$9,010.45 in costs.

In his Attorney Fee Order, the administrative law judge reduced the hourly rate requested for Winter to \$410 and reduced or disallowed certain itemized entries and costs.² The administrative law judge awarded claimant's counsel a fee of \$55,008.13, representing \$46,466 for legal services and \$8,542.13 in costs, payable by employer.

Employer appeals the fee award, arguing it is excessive as a matter of law in view of the results achieved. Claimant responds, urging rejection of employer's appeal. In his cross-appeal, claimant challenges the hourly rate awarded to Winter. Employer filed a combined response and reply brief.

We first address claimant's cross-appeal. BRB No. 19-0573A. Claimant challenges the administrative law judge's award of an hourly rate of \$410 for Winter's services, averring he erred by failing to award a rate commensurate with what Winter could command for similar work in the community, rejecting the evidence presented in support of the requested rate, and considering the complexity of the case in his analysis of the hourly rate.

The Supreme Court has held that the lodestar method, in which the number of hours reasonably expended in preparing and litigating the case is multiplied by a reasonable hourly rate, presumptively represents a "reasonable attorney's fee" under a federal fee-

¹ The Board affirmed the administrative law judge's decision. *Hernandez v. National Steel & Shipbuilding Co.*, BRB No. 18-0222 (Oct. 3, 2018) (unpub.), and the Board's decision was affirmed by the United States Court of Appeals for the Ninth Circuit. *Hernandez v. National Steel & Shipbuilding Co.*, 771 F. App'x 814 (9th Cir. 2019).

² The administrative law judge awarded Ellis and MacInnes hourly rates of \$260 and the requested paralegal rate of \$130. These awards are affirmed as they are not challenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

shifting statute, such as the Longshore Act. *See Perdue v. Kenny A.*, 559 U.S. 542 (2010); *City of Burlington v. Dague*, 505 U.S. 557 (1992); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The Court has also held that an attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886 (1984); *see also Perdue*, 559 U.S. at 551; *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009). Thus, in this case, once the administrative law judge determined San Diego is the relevant community for determining counsel's hourly rate, *see* Attorney Fee Order at 3, the burden was on claimant's counsel to produce satisfactory evidence "that the requested hourly rates are in line with those prevailing in the relevant community for similar services by lawyers of comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11; *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015).

In support of his requested hourly rate, Winter submitted: his own declaration addressing his current hourly rate as well as certificates addressing his law practice;³ a declaration from Attorney Paul Herman from Florida that longshore law and consumer law are similar; a declaration from Attorney Ronald Burdge with attachments stating longshore law is similar to consumer law and Winter's rate should be in the \$575 to \$596 range based on data from his Consumer Law Survey; a declaration from Attorney Timothy Brictson that Winter's rate should be "at least" \$425 per hour; the Laffey and United States Attorney's Office for the District of Columbia fee matrices; and cases arising under the Act in which he was awarded hourly rates between \$460 and \$515.

The administrative law judge addressed each of counsel's submissions and concluded he failed to meet his burden of establishing entitlement to the \$515 rate claimed. Attorney Fee Order at 6-7. He found the attorneys who provided declarations on Winter's behalf had insufficient knowledge of the San Diego legal market, counsel's other legal services did not suggest a specific hourly rate, the two matrices revealed nothing about the San Diego legal market, and the Board fee award on which counsel relied was unopposed. *Id.* at 6. He stated counsel's evidence gave him "very little information at all about fees charged by other lawyers in the San Diego market." *Id.* Thus, pursuant to *Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT), the administrative law judge looked to prior awards under the Act. He awarded Winter a rate of \$410 per hour, citing three awards by

³ Counsel's exhibits include certificates attesting to Winter's service as a Commissioner on the State Bar of California's Admiralty and Maritime Law Advisory Commission from 2008-2012; his "AV" rating from Martindale-Hubbell; and recognition from San Diego magazine. *See* Attorney Fee Petition, Ex. 4.

administrative law judges.⁴ In declining to use the higher rate awarded by the Ninth Circuit in *Shah v. Worldwide Language Resources, Inc.*, No. 16-72307 (9th Cir. Oct. 4, 2018) (Order) (awarding \$460 per hour), the administrative law judge agreed with employer that this case lacks the complexity of *Shah* such that a lower rate is warranted. *Id.* at 7.

We cannot affirm the \$410 per hour award for Winter's services. The administrative law judge appears to have reverted to the "tautological, self-referential enterprise" condemned in *Christensen*, 557 F.3d at 1054, 43 BRBS at 8(CRT), by dismissing without adequate reasoning all of the evidence offered by claimant's attorneys and adopting rates awarded by other administrative law judges. Administrative law judges are not required to blindly accept the rates claimed by claimants' counsel, but, in view of the "inherently difficult" nature of establishing a market rate in a market in which there are no paying clients, "the rates charged in private representations may afford relevant comparisons." *Blum*, 465 U.S. at 896 at n.11.

As required by the regulation at 20 C.F.R. §702.132(a), Winter supplied his "normal billing rate," \$515 per hour. The administrative law judge correctly recognized that Winter's burden is "to produce satisfactory evidence – in addition to [his] own affidavits – that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation," even though "there is no private market for attorney's fees under the LHWCA." Attorney Fee Order at 3 (quoting *Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT)). He stated Winter failed to provide evidence "clearly focused" on establishing his rate is in line with those in the community. *Id.* at 5. Winter, however, attempted to provide such evidence in the form of the Burdge documents. These documents speak to what private attorneys charge in San Diego for work alleged to be similar. The administrative law judge was not persuaded Burdge has "real day to day knowledge of the San Diego legal market." *Id.* at 5. Contrary to the administrative law judge's finding, the Burdge documents provide his opinion that Consumer Law and Longshore Law are similar,⁵ see Burdge Declaration at 5-7, the basis for Burdge's knowledge of the San Diego market, see *id.* at 12-13, and federal cases citing

⁴ The administrative law judge cited *Gallegos v. NASSCO*, OALJ Nos. 2016-LHC-01577; 2017-LHC-00518 (Aug. 21, 2018) (awarding \$396 to \$409 per hour); *Iuvale v. Coastal Marine Services*, OALJ No. 2015-LHC-01737 (Dec. 20, 2017) (awarding \$409 per hour), *aff'd*, BRB No. 18-0159 (Dec. 20, 2017), *appeal pending*, No. 19-71172 (9th Cir.), and *Zumwalt v. NASSCO*, OALJ Nos. 2011-LHC-00806; 2011-LHC-01935 (Sept. 20, 2016) (awarding \$396 per hour).

⁵ The Herman declaration also addresses the similarity of consumer and longshore law. See Attorney Fee Petition, Ex. 1 at 1-2.

his Consumer Law Survey as a basis for fee awards, *see id.* at 31-32.⁶ The administrative law judge's summary conclusion that Burdge lacked "real day-to-day knowledge of the San Diego legal market" is therefore arbitrary, as we are unable to perceive a basis for that finding. Nor has the administrative law judge explained why "real day-to-day knowledge" is necessary for Burdge to demonstrate an adequate understanding of fees in the relevant the legal market.

In addition, the administrative law judge erred in summarily dismissing the relevance of the fee award in *Fisher v. City of San Diego*, No. 12-CV-1268, 2013 WL 4401387 (S.D. Cal. Aug. 14, 2013), based upon his summary finding that the case involved a different attorney, claim and forum. The point of the market rate inquiry is to determine what counsel could earn for similar work, not "the same work." The administrative law judge is required to consider whether this fee award represents hourly rates prevalent in the San Diego community for similar services by lawyers of comparable skill, experience, and reputation. *See Shirrod*, 809 F.3d 1082, 49 BRBS 93(CRT).

Finally, while an administrative law judge may advert to prior fee awards under the Act if a claimant has failed to meet his burden of establishing a market rate, *see Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT) (citing *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 251, 38 BRBS 37, 41(CRT) (4th Cir. 2004)), the administrative law judge summarily relied on three awards presented by employer without discussing if these were market-based awards. Moreover, he erred in dismissing the *Shah* award on the basis that this case was comparatively less complex.⁷ The Ninth Circuit has held that a case's complexity relates to the number of compensable hours and not to the hourly rate. *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009).

Taken as a whole, the administrative law judge's inaccurate description of the Burdge declaration, his failure to discuss in the proper context all of the relevant evidence Winter presented, and his consideration of complexity, leads us to conclude the hourly rate

⁶ Burdge opined that the median hourly rate for all Consumer Law attorneys in the San Diego community was \$475, the 75% median rate is \$518, and the 95% median rate is \$596. Additionally, Burdge opined that San Diego area attorneys with 26 to 30 years of experience have a median hourly rate of \$625, and attorneys with 31 to 35 years of experience have a median hourly rate of \$650. *See Attorney Fee Petition*, Ex. 1 at 12-13.

⁷ The administrative law judge stated he was "inclined to agree with Employer that this case did not present a great deal of complexity," Attorney Fee Order at 7, and he would take this factor into account in determining Winter's hourly rate. *Id.*

awarded to Winter cannot be affirmed. We therefore vacate the \$410 hourly rate and remand the case for further consideration of this issue.

We next address employer's appeal. BRB No. 19-0573. Employer contends that because claimant was only partially successful before the administrative law judge, the fee awarded cannot be upheld.⁸ Employer's Brief at 9 (citing *Hensley v. Eckerhart*, 461 U.S. 421 (1983), *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993), *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir.), *cert. denied*, 488 U.S. 992 (1988), and *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1983)). For the following reasons, we remand the case for the administrative law judge to consider employer's arguments.

In *Hensley*, a plurality of the Supreme Court defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. The Court created a two-prong test focusing on the following questions:

First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Hensley, 461 U.S. at 434. The Court stated that the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. If a plaintiff has obtained "excellent" results, the fee award should not be reduced simply because he failed to prevail on every contention raised. If the plaintiff achieves only partial or limited success, however, the product of hours expended on litigation as a whole, times a reasonable hourly rate, may result in an excessive award. Therefore, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-437. This analysis applies to claims arising under the Act. *Baker*, 991 F.2d at 166, 27 BRBS at 17(CRT); *Brooks*, 963 F.2d at 1535, 25 BRBS at 164(CRT); *Horrigan*, 848 F.2d at 325, 21 BRBS at 77(CRT); *see also* 20 C.F.R. §702.132(a) (amount of benefits is relevant factor in fee award).

Employer raised *Hensley* to the administrative law judge in support of its contention that the fee requested was not appropriate based on claimant's degree of success. Although

⁸ Claimant was awarded an increased average weekly wage and medical benefits by the administrative law judge, but his claim for permanent total disability benefits was denied.

he acknowledged employer's position and stated he was not interested in second-guessing the reasonableness of Winter's services, the administrative law judge stated without elucidation that he was "disinclined to accept Employer's invitation to cut Winter's claim" by the 60 percent proposed based on degree of success.⁹ Attorney Fee Order at 9-10. As employer timely raised this issue and the administrative law judge did not adequately address the degree of claimant's success as required by *Hensley*, the administrative law judge must do so on remand, as he is in the best position to assess whether the fee requested is commensurate with the degree of success claimant obtained in relation to the benefits sought. See *Tahara*, 511 F.3d 950, 41 BRBS 53(CRT); see also *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *Ahmed v. Washington Metro. Area Transit Auth.*, 27 BRBS 24 (1993).

Accordingly, we vacate administrative law judge's Attorney Fee Order and remand the case for further consideration consistent with this decision.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

⁹ The administrative law judge reduced for other reasons Winter's hours by 5, Ellis's hours by 10, and Lacina's hours by 3.8. Attorney Fee Order at 10-11. These reductions are affirmed as unchallenged on appeal. *Scalio*, 41 BRBS 57.